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Nos. 80-415 and 80-1239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island & Pacific Railroad Company; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, *ET AL.*; UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; AND ANDREW L. LEWIS, JR., Secretary of Transportation,
Appellees.

Consolidated Appeals From The United States District Court For The Northern District Of Illinois And From The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED*

1. Whether the issue of the constitutionality of Sections 106 and 110 of the Rock Island Transition and Employee Assistance Act (RITA), as modified by Section 701 of the Staggers Rail Act of 1980, is properly before this Court?

2. Did the Rock Island Reorganization Court improperly enjoin an Act of Congress intended to provide immediate protective benefits to needy Rock Island employees where there was no valid showing that the estate would be irreparably harmed while the Trustee complied with the directives of a statute which Congress has twice declared to be essential to the public interest?

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*This consolidated proceeding involves two appeals, one (No. 80-415), from a preliminary injunction entered on June 9, 1980, by the United States District Court for the Northern District of Illinois, sitting as a railroad reorganization court for the Chicago, Rock Island & Pacific Railroad; the other (No. 80-1239), from a decision entered by the United States Court of Appeals for the Seventh Circuit on December 16, 1980, affirming by an equally divided *en banc* court an injunctive order issued by the Rock Island reorganization court in October 1980. Both appeals have been taken by the Railway Labor Executives' Association, a voluntary, unincorporated association of the Chief Executive Officers of virtually all of the standard labor organizations which represent railroad employees in this country. The member organizations of appellant are listed in Appendix B to this Brief. The Trustee of the Rock Island estate, the First National Bank of Chicago and the Continental Illinois National Bank and Trust Company of Chicago, as Indentured Trustees, and Henry Crown, *et al.*, as shareholders and general creditors, initiated the proceeding before the reorganization court out of which these appeals have arisen by requesting declaratory and injunctive relief. That proceeding was one against the United States of America, the Interstate Commerce Commission, and the Honorable Neil P. Goldschmidt as Secretary of Transportation. Appellant, an intervenor in the reorganization proceeding, participated therein as an active party. The Honorable Andrew L. Lewis, Jr., pursuant to Rule 40.3 of the Rules of this Court, has been substituted for his predecessor as a named appellee.

3. Did Congress, by specifically providing that nothing in RITA "shall limit the right of any person to commence an action" under the Tucker Act, effectively preclude the conclusion by the courts below that Section 106 of RITA effects an uncompensated taking of private property for public purposes?

4. Does Congress, after concluding that the public interest requires adequate protection of railroad employees, have the power to require the protection of employees as a term upon which a railroad in reorganization under Section 77 of the Bankruptcy Act may withdraw its assets from the business of providing interstate rail transportation?

5. Was the Rock Island Reorganization Court correct in concluding that the public interest no longer remains an important part of its exercise of jurisdiction under Section 77 of the Bankruptcy Act?

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WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island & Pacific Railroad Company; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, *ET AL.*; UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; AND ANDREW L. LEWIS, JR., Secretary of Transportation,

Appellees.

Consolidated Appeals From The United States District Court For The Northern District Of Illinois And From The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR APPELLANT

On May 30, 1980, the Rock Island Transition and Employee Assistance Act [hereinafter, "RITA"] was enacted into law as Title I of Pub. L. No. 96-254, 94 Stat. 399. In Section 106 of that Act, 45 U.S.C. § 1005, Congress provided a detailed scheme to assure that needy employees of the Chicago, Rock Island & Pacific Railroad Company [hereinafter, "CRI" or "Rock Island"] received immediate financial assistance. However, on June 9, 1980, the United States District Court for the Northern District of Illinois, sitting as a railroad reorganization court for the Rock Island under Section 77 of the

Bankruptcy Act, 11 U.S.C. § 205,[1] issued a preliminary injunction at the request of the Trustee, the major shareholders, and certain creditors, preliminarily enjoining implementation of that employee protective program. Appellant Railway Labor Executives' Association [hereinafter, "RLEA"] noted and then perfected an appeal to this Court from that interlocutory injunction (No. 80-415). On April 27, 1981, this Court directed that further consideration of the question of jurisdiction be postponed to the hearing of the case on the merits.

While appellant's jurisdictional request was pending before this Court, Congress passed the Staggers Rail Act of 1980 [hereinafter, "SRA"], Pub. L. No. 96-448, 94 Stat. 1895, which, in Section 701, amended Section 106 of RITA. The SRA was enacted on October 14, 1980. By an order dated October 15, 1980, as modified by a subsequent order dated October 16, 1980, the Rock Island reorganization court again enjoined, preliminarily, implementation of Section 106 of RITA and declared that the statutory provision was unconstitutional as effecting an uncompensated taking of private property for public purposes. Appellant RLEA immediately took an appeal from that interlocutory order to the United States Court of Appeals for the Seventh Circuit pursuant to Section 124(a) of RITA, 45 U.S.C. § 1018(a). On December 16, 1980 the court of appeals entered an order affirming by an equally divided *en banc* court the October 1980 preliminary injunction. Appellant RLEA noted and thereafter perfected an appeal to this Court (No. 80-1239), and on April 27, 1981, this Court noted probable jurisdiction and consolidated this case with appellant's appeal in No. 80-415.

OPINIONS BELOW

No opinions or orders issued in these cases by the courts below are reported. The preliminary injunction at issue in No.

[1] Section 77 of the Bankruptcy Act has been repealed by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, but that repeal is not effective for cases which were pending under Section 77 when the Reform Act was enacted. Section 403(a), 92 Stat. 2683.

80-415 was issued by the Rock Island reorganization court on June 9, 1980 (J.A.[2] 159a-60a) and was supported by oral statements of that court given on June 9, 1980 (J.A. 151a-58a), and then on June 20, 1980 (J.A. 177a-84a) when that court denied motions to reconsider. On October 7, 1980, the reorganization court orally stated its tentative conclusions why it believed the SRA amendments did not cure, in its opinion, the constitutional defects which it saw in RITA (J.A. 201a-04a), and it thereafter issued an order dated October 16, 1980, preliminarily enjoining Sections 106 and 110 of RITA, as amended. J.A. 205a-08a. That order was modified by a minute order dated October 16, 1980. J.A. 209a. On December 16, 1980, the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, affirmed by an equally divided court (J.A. 210a-11a) the October 1980 preliminary injunction without an opinion. The judgment accompanying the court of appeals unpublished *per curiam* order is reproduced in the Jurisdictional Statement in No. 80-1239, at 31a-32a.

JURISDICTION

Appellant RLEA's appeal in No. 80-1239 involves an appeal from an order of the United States Court of Appeals for the Seventh Circuit affirming an interlocutory order which held that portions of an Act of Congress were unconstitutional, and preliminarily enjoined agencies of the federal government, as well as the Rock Island Trustee, from complying with certain commands of that Act. Appellant RLEA respectfully submits that this Court has jurisdiction over this appeal by virtue of 28 U.S.C. § 1252. *Accord, Parker* v. *Levy*, 417 U.S. 733 (1974). The order and judgment of the court of appeals were entered on December 16, 1980, and appellant RLEA noted its appeal on December 19, 1980. J.A. 16a. Appellant RLEA docketed its appeal with this Court on January 21, 1981.

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[2] "J.A." as used herein refers to the Joint Appendix.

Appellant RLEA's appeal in No. 80-415 involves an appeal from an earlier order declaring portions of an Act of Congress unconstitutional and preliminarily enjoining agencies of the Federal Government, as well as the Rock Island Trustee, from complying with certain commands of that Act. That preliminary injunction was entered on June 9, 1980, and appellant RLEA noted its appeal to this Court on June 11, 1980. J.A. 10a. Appellant's appeal was timely docketed on September 15, 1980. However, as explained *infra* at p. 21 n.12, appellant RLEA respectfully submits that the events in No. 80-1239 have rendered its appeal in No. 80-415 moot. Consequently, appellant RLEA suggests that this Court note probable jurisdiction and then vacate the June 9th injunction as being moot.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

These appeals involve the validity of Sections 106 and 110 of RITA, 45 U.S.C. §§ 1005, 1008, as amended by the SRA. These provisions, both as originally enacted and as amended, are set forth in Appendix A to this Brief. Sections 106 and 110 of RITA have been asserted to be contrary to the commands of the Fifth Amendment to the Constitution of the United States, which is also reproduced in Appendix A. Section 124(c) of RITA, as added by the SRA, 45 U.S.C. § 1018(c), is involved as well, and it is reproduced in Appendix A.

STATEMENT OF THE CASE

Incorporated in Delaware in 1947, the Rock Island is the successor in interest to the Chicago, Rock Island and Pacific Railway, a carrier which was in reorganization under Section 77 of the Bankruptcy Act from 1933 to 1947.[3] *In re Chicago R.I. & P.Ry.*, 267 I.C.C. 867 (1947); *see also*, 257 I.C.C. 307

[3] The Rock Island was one of the first carriers to use Section 77 of the Bankruptcy Act, and it was in that proceeding, *i.e.*, the reorganization of the Chicago, Rock Island and Pacific Railway Company, that this Court upheld the constitutionality of that statute. *Continental Ill. Nat'l Bank* v. *Chicago, R.I. & P. Ry.*, 294 U.S. 648 (1935).

(1944). Originally chartered in 1847 the Rock Island's predecessor companies grew over the years by consolidations, acquisitions and construction of lines so that by the mid 1970's the CRI was one of the largest railroads in this country. By 1975, the Rock Island operated in thirteen (13) states, primarily in the midwestern region of the country, and its system consisted of 8,139 miles of main line track, 2,329 miles of branch lines, and 763.2 miles of trackage rights over other carriers. *Chicago, R.I. & P.R.—Abandonment,* 363 I.C.C. 150, 154 (1980). Approximately 10,000 workers were employed by the Rock Island in 1978 to perform those operations. The importance of the CRI system is exemplified by a 1974 statement of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] in which the ICC described the Rock Island as providing a "service which is an important segment of the continental transportation system." *Chicago & N.W. Ry.—Control—Chicago, R.I. & P.R.,* 347 I.C.C. 556, 595 (1974). Unfortunately, the CRI's financial posture by the close of 1974 did not assure its continued survival.

A. The Demise Of The Rock Island

During the years after its capital restructuring in 1947, the Rock Island's operating revenues increased, but not as fast as the increase in its operating and maintenance expenses. To counter this increase in costs, the CRI deferred maintenance, but by 1965 the carrier began to sustain a net loss, and by 1967 it began to show a net loss from railway operations alone. *Chicago & N.W. RY—Control, supra,* 347 I.C.C. at 565, 691-96. That deficit operation posture did not improve by 1975 (*see, Chicago, R.I. & P.R.—Abandonment, supra,* 363 I.C.C. at 175), but rather, became more critical so that on March 17, 1975, the Rock Island once again sought the aid of Section 77 of the Bankruptcy Act to restructure its financial base. J.A. 1a. That petition for reorganization was approved on March 17, 1975, and on March 28, 1975, appellee William M. Gibbons was appointed Trustee of the debtor. J.A. 1a.

After the petition for reorganization was filed, the Rock Island continued to operate, first as a debtor-in-possession (J.A. 1a), and then under the direction of the Trustee. But even

though the carrier's cash position was temporarily improved by its ability under Section 77 to defer interest and principal payments, the Rock Island continued to experience operating losses as well as a steady erosion of its traffic base. Operating losses had increased from $6.5 million in 1968 to $22.2 million in 1974, and by the end of 1977 the operating loss for that year amounted to $38.5 million. *Chicago, R.I. & P.R.—Abandonment, supra,* 363 I.C.C. at 175. The Rock Island's rapidly deteriorating financial position was exacerbated by the severe winter of 1978, which not only dramatically increased its losses, but also damaged its physical plant. 363 I.C.C. at 177-81. Consequently, by the summer of 1979, the future of the Rock Island was not bright; moreover, its creditors and shareholders were demanding an end to deficit operations and the liquidation of that carrier.

During the control by Trustee Gibbons and the reorganization court, the Rock Island continued to bargain with its employees pursuant to the Railway Labor Act, 45 U.S.C. § 151, *et seq.* In 1977, however, the Trustee informed those organizations with which the CRI had bargained as a participant with other railroads on a national level, that it would no longer negotiate its work rules and wages on that basis. J.A. 275a. After more than two (2) years of negotiations, a labor organization representing approximately 1,600 Rock Island employees (J.A. 275a) was unable to reach an agreement with the Trustee. On June 20, 1979, the National Mediation Board proffered arbitration in accordance with Section 7 of the Railway Labor Act, 45 U.S.C. § 157. J.A. 276a. That proffer was accepted by the labor organization, but was rejected by the Trustee. J.A. 276a. Subsequently, the labor organization continued to negotiate with the Trustee under the auspices of the National Mediation Board during the "cooling-off" period provided for by Section 5, First of the Act, 45 U.S.C. § 155, First. J.A. 276a. On August 28, 1979, at the expiration of the status quo period, that labor organization struck the Rock Island. One day later, a second labor organization which represented approximately 2,500 CRI employees, also struck the Rock Island. J.A. 275a, 277a. Following these actions, the Trustee "locked-out" the striking Rock Island employees and

abolished the positions of its other organized employees; the Trustee then attempted to operate a truncated system with non-union personnel.

On September 20, 1979, the President, acting pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. § 160, created an Emergency Board to investigate the disputes, thereby, invoking the status quo provisions of Section 10 of the Railway Labor Act. *Executive Order No. 12,159,* 44 Fed. Req. 54687 (September 21, 1979). Because of its lack of start-up capital, the Rock Island could not resume full operations in compliance with the status quo provisions of the Railway Labor Act, and on September 26, 1979, the Commission directed the Kansas City Terminal Railway Company [hereinafter, "KCT"] to operate "virtually all" of the Rock Island lines under 49 U.S.C. § 11125. *Directed Service Order No. 1398,* 360 I.C.C. 289, 290-92 (1979). As the ICC explained in its Abandonment Report: "Rock Island's cashlessness of September 1979 was the result of an arduous and painful erosion of its traffic base and facilities." *Chicago, R.I. & P.R.—Abandonment, supra,* 363 I.C.C. at 160. On September 26, 1979, the reorganization court denied the Trustee's oral application for authority to continue operating the CRI system. J.A. 3a.

Directed Service operations began on October 5, 1979, and continued into March 1980 when the ICC funds were near exhaustion. *See, Directed Service Order No. 1398 (Sub-No. 1),* 360 I.C.C. 478 (1979). Those operations by the KCT ceased on March 23, 1980, due to a lack of appropriated funds, but nevertheless, the need for Rock Island service which warranted the invocation of Section 11125 continued to exist. *Directed Service Order No. 1462,* 363 I.C.C. 72, 74 (1980). To meet that need, the ICC directed various railroads under Section 11125 to operate portions of the CRI system on a voluntary basis without compensation. *Id.* As the Commission stated in explanation of its actions:

> Shippers along the involved lines still require significant rail service. A prolonged cessation of service after the expiration of Directed Service Order No. 1398 on March 23, 1980, would disrupt local traffic all along these lines.

> In view of the urgent need for continued service over RI's lines pending the implementation of long-range solutions, we consider it imperative to authorize some form of interim service.

363 I.C.C. at 74. That action was only a stop-gap measure, however, because the Commission's authority to direct operations over CRI lines was for a limited duration—*i.e.*, only 240 days from October 5, 1979. *Id.* at 75. Proceedings before the reorganization court in early 1980 made it clear that the Rock Island would most likely not be able to resume operations when directed service ended.

On January 25, 1980, the CRI reorganization court concluded that the railroad was not reorganizable. However, the reorganization court made that conclusion without the benefit of a report from the ICC under 11 U.S.C. § 205 (d), and thus, it refused to transmit to the ICC, as mandated by Bankruptcy Rule 8-303, the plan of reorganization which had been filed by the Trustee on December 28, 1979. Instead, that court ordered the Trustee to plan for the liquidation of the debtor.[4] Thereafter, the reorganization court began to authorize certain acts on the part of the Trustee designed to accomplish liquidation of the estate by either abandonment of lines or sales of Rock Island property to interested purchasers. On April 14, 1980, the reorganization court authorized the Trustee to file by April 24, 1980, an application with the ICC under Section 17(a) of the Milwaukee Railroad Restructuring Act

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[4] Appellant RLEA took an appeal from the liquidation order to the United States Court of Appeals for the Seventh Circuit (No. 80-1353) on the ground, *inter alia*, that a Section 77 reorganization court does not have jurisdiction under Section 77 to order and to control the liquidation of a railroad in reorganization. *See, Ecker* v. *Western Pac. R.*, 318 U.S. 448 (1943); *In re Lehigh Valley R.*, 558 F.2d 137 (3rd Cir. 1977). On February 11, 1981, the court of appeals affirmed the liquidation order (J.A. at 377a), and on May 12, 1981, RLEA filed with this court a petition for a writ of certiorari to review that decision. Sup. Ct. No. 80-1899. That petition is still pending.

[hereinafter, "MRRA"], 45 U.S.C. § 915(a),[5] for "its report confirming the abandonment of the Rock Island's total railroad system subject to sale of portions of such system to other entities for their operations thereof . . . ." Order No. 232 at 1-2. The ICC was given until May 24, 1980, in which to file its advisory report, and any party desiring to comment on that report was given until May 30, 1980 to do so in writing; a hearing was set for June 2, 1980. *Id.* at 2.

On June 2, 1980, three days *after* RITA was enacted, the CRI reorganization court acted upon the Trustee's motion to abandon the entire Rock Island system and ruled that the "discontinuance of all of its [CRI's] rail services and obligations as a common carrier is hereby confirmed and decreed . . . ." Order No. 248 at 2; J.A. 271a. Moreover, the reorganization court also provided in that order that no provisions should be imposed to protect employees since:

> [L]abor protective conditions or arrangements are not required of Rock Island's estate pursuant to Section 17 of the MRRA by reason of Rock Island's systemwide termination of operations and total line abandonment which do not warrant further consumption of Rock Island's assets for protection payments to employees whose jobs with Rock Island are no longer in existence by reason of such total abandonment and operational discontinuance. . ., and, that consistent with ICC precedent, with the Rock Island's constitutional right to abandon its lines and discontinue its service, and with the equities of the Rock Island situation, no labor protection arrangements may be imposed on the Rock Island estate . . . . *Id.* at 1-2; J.A. 270a-71a.[6]

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[5] Section 17(a) of the MRRA gave the reorganization court the authority to authorize abandonments of Rock Island Lines, and it also provided that: "In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under [49 U.S.C. § 11347] . . . ."

[6] On June 9, 1980, RLEA noted an appeal from that order (7th Cir. No. 80-1788), and on August 4, 1980, the United States also noted an appeal. 7th Cir. No. 80-2075. RLEA's appeal was argued on June 10, 1981.

B. Response of Congress To Rock Island's Plight

Shortly after the CRI reorganization court ordered the Trustee to liquidate the Rock Island, Congress began to consider legislation designed to preserve essential Rock Island services, albeit through other carriers. *See,* H.R. 6837, 96th Cong., 2d Sess. It was soon realized, however, that in order to deal effectively with the problems created by the demise of the Rock Island, Congress would have to address the treatment of Rock Island employees. As the record in this case clearly shows, there was, and still is an urgent need to consider the interest of Rock Island employees.

In 1978, the Trustee employed 10,749 people to operate the CRI (J.A. 86a, *see also,* J.A. 165a); 6,389 of those employees had been employees of the CRI for ten (10) years or more, and 1,590 of those long time workers had been with the Rock Island for thirty (30) or more years. J.A. 86a. By August 1979, the number of Rock Island employees had dropped to 9,713, and by December 1979, that number had further declined to 8,407. J.A. 99a; 13a. By June 1980, only 2,641 Rock Island employees were shown as having been retained in the various operations over CRI lines. J.A. 89a-90a; 165a. By that time, 2,557 other Rock Island employees were receiving benefits under the Railroad Unemployment Insurance Act, 45 U.S.C. § 351, *et. seq.,* 43 other employees who were unemployed had exhausted their benefits under that Act, some employees had retired, and many others were unaccounted for. J.A. 102a, 165a. The number of unemployed Rock Island employees increased over the summer of 1980, and by September 1980, 3,704 Rock Island workers were drawing Railroad Unemployment Insurance Benefits—*i.e.,* a maximum of $25 per day for (10) days during each fourteen (14) day registration period. J.A. 97a, 99a; 13a.

Rail labor had attempted to address the problem of the treatment of Rock Island and other bankruptcy carrier employees in the midwest by entering into an agreement on March 4, 1980 with major railroads involved in the midwest rail restructuring. That agreement, commonly called the

March 4 Hiring Agreement, was entered into "in an attempt to provide as many of its members with jobs as possible." *St. Louis S.W. Ry.—Purchase,* 363 I.C.C. 320, 380(1980). As the ICC explained in examining the scope of that agreement: "Few carriers seemed willing to purchase portions of RI or Milwaukee in large part due to the expenses of labor protection. In order to give carriers an incentive to purchase RI and Milwaukee lines, and thus hire RI and Milwaukee employees, RLEA" agreed to the Hiring Agreement levels of protection for certain employees. *Id.* That agreement, however, was only half of the employee protections required in the Rock Island situation since it did not provide any protection for CRI employees not hired by an acquiring carrier. *See,* H. Rpt. No. 96-839, 96th Cong., 2d Sess. at 53-62(1980). Congress, in its consideration of the proposals which became RITA, addressed itself to the treatment of "those individuals who will not be employed by a temporary operator or a permanent carrier." *Id.* at 22.

Shortly before the expiration of permissible directed service for the Rock Island lines, Congress passed on May 22, 1980, the bill which became Public Law 96-254 on May 30, 1980. In several provisions of Title I to that law (*i.e.,* RITA), Congress provided: (1) a means to continue interim operations until a permanent solution was obtained (*e.g.,* Sections 104, 120, and 122, 45 U.S.C. § 1003, 1015 and 1017); (2) a source of federally financed funds to acquire Rock Island properties (Section 112, 45 U.S.C. § 825); and (3) that the ICC was to expedite all applications to acquire or to lease Rock Island lines. Section 111, 45 U.S.C. § 1009. In other provisions of RITA, Congress provided assurances of protections for the interests of CRI employees, including a compromise employee protective arrangement (Section 106, 45 U.S.C. § 1005), priority of hiring (Sections 105, 107, 45 U.S.C. § 1004, 1006), and retraining assistance to separated CRI employees. Section 119, 45 U.S.C. § 1014. In Section 110 of the Act, 45 U.S.C. § 1008, Congress provided that the Trustee could obtain a federal loan guarantee to acquire the funds needed to comply with Section 106.

Section 106 of RITA and its funding provision Section 110, are the provisions at issue in these consolidated cases.

Section 106 of RITA was patterned after Section 9 of the MRRA, 45 U.S.C. § 908, and, as the House report explained:

> [P]rovides that the representative of the Rock Island Trustee and representatives of the Rock Island employees, with the assistance of the National Mediation Board, shall negotiate an employee protection arrangement within ten days of enactment. Should those negotiations prove unsuccessful, the ICC will impose, not later than 30 days after enactment, a fair and equitable arrangement no less protective of the employees than under section 9 of the Milwaukee Railroad Restructuring Act. The employee protection payments shall be administrative expenses as they were under section 9(d) of the MRRA . . . . The ICC, in imposing protection, shall consider benefits including moving expenses, separation allowances, health insurance benefits and other benefits, subject to the $75 million limitation. Because litigation may result from this provision, the bill provides for an expedited litigation procedure.

H. Rpt. No. 96-839, *supra*, at 22.

Congress carefully drafted that legislation to provide for an expeditious implementation of the mandated arrangement to protect Rock Island employees, and in the Conference Report on that bill, the conferees noted in reference to Section 106:

> This section mandates early implementation of employee protection to avoid disruption of rail service and undue displacement of employees. The conferees intend that if no agreement is reached within the initial 10-day period and the ICC prescribes an agreement, the bankruptcy court will take whatever actions are appropriate and necessary for the immediate implementation of such agreement, *so that payments to Rock Island employees will be made forthwith, notwithstanding any ensuing litigation concerning such payments. The conferees believe that legislation is essential to provide for an orderly transition.*

H. Rpt. No. 96-1041, 96th Cong., 2d Sess. at 26(1980) (emphasis added).

Section 106 was intended to be a compromise of a potentially larger obligation under Section 17(a) of the MRRA to provide employee protective benefits as developed under 49 U.S.C. § 11347 (H. Rpt. No. 96-839, *supra*, at 21-22), and it was believed that: "In determining the constitutionality of the statute, . . . the court will find that the benefits conveyed by this statute to the estate of the bankrupt railroad are so great so as to make any claims of constitutional 'taking' untenable." *Id.* at 22. That belief was premised upon Congress' opinion that as "part of the [liquidation] . . . order, the Rock Island must obtain a certificate of abandonment from the bankruptcy judge with a fair arrangement for employees at least as protective" of their interests as that required by 49 U.S.C. § 11347. *Id.* at 21; *see also, Id.* at 23. However, as shown above, three (3) days after RITA was enacted, the CRI reorganization Court ruled that the estate would not have to provide any employee protection in abandoning its rail system.

Three (3) days after the court authorized that abandonment, the Trustee along with the principal creditors and shareholders of the debtor filed a twenty-six (26) page Complaint with the reorganization court on June 5, 1980, seeking both a judgment declaring the entire Act unconstitutional, and an injunction enjoining its enforcement. J.A. 21a. A hearing on the Trustee's and creditors' request for interlocutory relief was conducted on June 9, 1980, before United States District Judge Frank J. McGarr sitting as the CRI reorganization court. At the conclusion of that hearing the court ruled that Sections 106 and 110 of RITA dealing with an employee protection arrangement were unconstitutional as depriving the estate of property for a public purpose, and possibly for other reasons as well. J.A. 153-54a, 183a. The Court, without making a specific finding of irreparable harm except concluding that the Act was unconstitutional, issued a preliminary injunction: (1) enjoining the ICC from asserting jurisdiction to consider or to impose any employee protective arrangement, (2) enjoining the Trustee from entering into negotiations with labor representatives to arrive at an agreement under RITA,

and (3) enjoining Secretary of Transportation Neil P. Goldschmidt from complying with obligations imposed by Section 110(a) of the Act. J.A. 160a.

On June 11, 1980, RLEA filed a notice of Appeal to this Court from that order (J.A. 10a) and on September 15, 1980, it perfected that appeal (No. 80-415) by filing its Jurisdictional Statement. The United States also noted an appeal from the June 9th order (J.A. 10a); however, it did not perfect its appeal. Rather, in November 1980 the government filed a pleading as an appellee in RLEA's appeal asserting that the SRA amendments rendered RLEA's appeal from the June 9th order moot. The government suggested that this Court note probable jurisdiction and vacate the injunctive order.

On June 20, 1980, the United States filed a motion with the District Court requesting that court to reconsider its ruling of June 9, 1980, and to vacate the injunction (J.A. 10a). Appellant RLEA and the ICC supported that motion (*Id.*), but after hearing oral argument on June 20, 1980, the court denied those requests. In doing so, the court reiterated its earlier view that Sections 106 and 110 of RITA were unconsitutional for several reasons, but specifically enumerated only one such reason—*i.e.*, "any imposition of labor protection by Congress on the Rock Island payable out of the Estate was an unconstitutional taking." J.A. 184a.

Appellant RLEA filed with this Court on June 21, 1980, an application for a stay of that preliminary injunction, but on June 28, 1980, Mr. Justice Stevens denied that request with a written statement. After examining the pleadings filed with the application for a stay, Mr. Justice Stevens stated:

> . . . I am now of the opinion that Judge McGarr was probably correct in concluding that the Act authorizes an unconstitutional taking or property of the estate. It appears to direct a transfer of $75 million off the top of the estate's assets to the employees. While such a transfer might be permissible in the course of a genuine reorganization, at least as of this moment, I have difficulty perceiving how, in the context of a liquidation, this is any-

> thing other than a simple taking of the property of the general creditors, as the trustee argues.

RLEA v. *Gibbons*, 448 U.S. 1301, 1305 (1980) (Stevens, J., *in chambers*). Mr. Justice Stevens then went on to note that since it was not clear that the Tucker Act (28 U.S.C. § 1491), was available, there was a "strong possibility that a stay would set in motion a chain of events that would lead to substantial payments that are unconstitutional and unrecoverable . . . ." *Id.* Such a possibility was, according to Mr. Justice Stevens, "a sufficient showing of irreparable damage [so as] . . . to support the entry of the preliminary injunction." *Id.* On July 2, 1980, the full Court, with three Justices dissenting and one Justice abstaining, voted to deny that stay request. 448 U.S. 909 (1980).

C. Congress' Second Response To The Plight Of Rock Island Employees

When it became apparent that litigation over the validity of Sections 106 and 110 of RITA would delay the immediate distribution of funds to needy Rock Island employees, Congress again considered that legislaion. *E.g.*, H.R. 7235, § 227, 96th Cong., 2d Sess., 126 Cong. Rec. H8619 (September 9, 1980). On September 30, 1980, Congress passed the Staggers Rail Act of 1980, and by Section 701 of that Act amended RITA. Section 701(a)(1) addressed the concern of this Court that the Tucker Act remedy might not be available to persons who belived they were deprived of property by virtue of RITA; it added a new provision (Section 124, 45 U.S.C. § 1018) which provided in subsection (c) that: "Nothing in this Act . . . shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act)." As Congress explained in its Conference Report to accompany the SRA, H.Rpt. No. 96-1430, 96th Cong. 2d Sess. at 138 (1980):

> By specifically stating that there is a Tucker Act remedy, the benefits and allowances will immediately become

available to the qualifying Rock Island employees and the Trustee may pursue his allegations of unconstitutional action under the Tucker Act.

To assure further that there would be no delay in the distribution of funds to employees, Congress added as Section 124(a)(1) of RITA a provision which provided that: "Notwithstanding any other provisions of law [*i.e.*, 28 U.S.C. § 1252], any appeal from . . . any decision of the bankruptcy court with respect to the constitutionality of any provision of this Act . . . shall be taken" to the Seventh Circuit; and it added as Section 124(b) of RITA the requirement that any such appeal "involving section 106 or 110 of this title" be decided within sixty (60) days by that court sitting *en banc*.

Section 701(b)(1) of the SRA modified the provisions of Section 106 of RITA and reenacted that section. These modifications to Section 106 may readily be seen by examining the side-by-side comparison of the two Acts in Appendix A, hereto; but basically the new provision established a shorter schedule for the negotiation or imposition of a protective arrangement (H.Rpt. No. 96-1430, *supra*, at 137), and it repealed the anti-stay and limited review features of the original provision. *Compare*, Section 106(d), as amended. Section 110 was also modified by the SRA, for Section 701(a)(2) added the words "to employees" immediately after "liability" in Section 110(e) of RITA, thus eliminating the contention that Section 110(e) removed the Tucker Act remedy.

Shortly after the SRA bill was sent to the President for his signature, appellant RLEA, the United States and the ICC asked the CRI reorganization court to vacate the June 9th injunction. J.A. 11a. Appellant RLEA also requested that the court direct the Trustee to negotiate with labor to devise a protective agreement under Section 106(a). Appellant and the Government parties asserted that enactment of the SRA would moot the June 9th injunction, and that by expressly providing that the Tucker Act was available to the appellees, Congress eliminated appellees' claim of irreparable harm. Oral argument was held on those motions on October 7, 1980, and

after listening to those arguments the reorganization court stated its tentative conclusions which were later finalized by the order dated October 15, 1980. As the court stated on October 7, 1980:

> The bill, as I now see it, amends and attempts to cure some of the procedural problems with the Act which was before me in an effort to remove the irreparable injury argument concerning the old Act. The new bill does not address the basic finding of the Court that the whole program which has been changed only cosmetically . . . was an unconstitutional deprivation.

J.A. 202a. And as the court then added: "This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and is subject to the same injunction." J.A. 203a.

On October 16, 1980, the reorganization court issued an order dated October 15, 1980, and entitled "Preliminary Injunction".[7] J.A. 207a. In that order the court concluded that:

> The Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property in violation of the rights of the Rock Island estate, its creditors and shareholders which are secured by the Fifth Amendment of the United States Constitution.

J.A. 207a.

Appellant RLEA and the Government had also argued that the reorganization court should not preliminarily enjoin enforcement of Sections 106 and 110 of RITA because the SRA amendments to RITA effectively eliminated any claim of irreparable harm. *E.g.*, J.A. 192a-93a. The court disagreed and concluded that the statutory scheme could not be implemented without causing "irreparable injury to the administra-

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[7] By an order dated October 16, 1980, the reorganization court modified its October 15th dated order to read that the court was continuing the June 9th injunction in effect rather than issuing a new injunction. J.A. 209a.

tion of the estate for the benefit of the creditors." J.A. 207a. As the court explained:

> The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

J.A. 207a. The Court then issued the same form of injunctive order as it had issued on June 9th, and on October 16, 1980, appellant RLEA filed a notice of appeal to the Seventh Circuit pursuant to Section 124(a)(1) of RITA, as added by the SRA. J.A. 12a. The Government also took an appeal to the Seventh Circuit from that order on October 29, 1980. J.A. 13a.

RLEA's and the Government's appeals were consolidated and were heard *en banc* on November 13, 1980. On December 16, 1980, the Court of Appeals issued an order affirming the order of the reorganization court by an equally divided court.[8] J.A. 210a. Because two Judges disqualified themselves, only six judges heard the appeal; three of the Judges who heard the appeals voted to reverse[9] and three of the Judges voted to affirm.[10] No opinions were filed with that short order. This appeal has followed.

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[8] Appellees Trustee, creditors and shareholders moved to dismiss RLEA's appeal due to lack of jurisdiction in light of 28 U.S.C. § 1252 and RLEA's appeal to this Court in No. 80-415. The court concluded that in view of the Staggers Rail Act the motion to dismiss the appeal should be denied. J.A. 211a. *See also, Gibbons* v. *RLEA*, Sup. Ct. No. 80-704.

[9] Chief Judge Fairchild and Judges Sprecher and Cudahy voted to reverse.

[10] Judges Swygert, Bauer and Wood voted to affirm.

SUMMARY OF ARGUMENTS

I. While 28 U.S.C. §1252 gives this Court jurisdiction over appellant RLEA's appeals from two interlocutory orders which enjoined, on constitutional grounds, the implementation of the employee protection program established by RITA, not all of the constitutional issues considered by the courts below were properly before those courts or are properly before this Court. Appellant's appeal in No. 80-415 from the preliminary injunction issued in June 1980 is now moot because a decision on the validity of that order will not affect the positions of the adversary parties. It is the subsequent amendments to the statutes at issue, and the subsequent injunctive order which will determine whether those sections are to be enforced. *E.g., United States* v. *Alaska S.S. Co.*, 253 U.S. 113 (1920). Appellants' appeal in No. 80-1239 from the second injunctive order places before this Court in a "clean-cut and concrete form" the constitutional issue of whether the availability of a Tucker Act remedy obviates a finding that Sections 106 and 110 of RITA, as amended, can effect an *uncompensated* taking since, at the time of the taking, adequate provision for compensation must be present. *Dames & Moore* v. *Regan*, Sup. Ct. No. 80-2078, decided July 2, 1981; *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). The issue on which the courts below enjoined this Act of Congress, however, was not justiciable when the lower courts passed on that question, and is still non-justiciable since the question as posed by the Rock Island appellees, as to whether Section 106 and 110 of RITA are regulations which have become takings, involves an ad hoc, factual inquiry which is best resolved on a claim for compensation when the facts are fully developed *after* the empioyee protection program has been implemented. *Hodel* v. *Virginia Surface Mining & Reclamation Assoc., Inc.*, Sup. Ct. No. 79-1538, decided June 15, 1981; *Coffman* v. *Breeze Corporations, Inc.*, 323 U.S. 316 (1945).

II. A. Congress, the ultimate arbiter of the public interest, has twice declared that the immediate implementation of

RITA's employee protective program was essential to continued rail service for a substantial region of our country, but nevertheless, the courts below enjoined the implementation of that program because, in their view, the statute was unconstitutional in that it took private property for a public purpose. That conclusion, appellant RLEA submits, was erroneous because it failed to recognize that the Fifth Amendment to the Constitution prohibits only uncompensated takings; so long as Congress has provided a reasonable, certain and adequate means to obtain just compensation, an asserted taking is not unconstitutional. *Regional Rail Reorganization Act Cases, supra.* Here, Congress has provided through the Tucker Act, 28 U.S.C. §§1346(a), 1491, a reasonable, certain and adequate means to obtain compensation, and thus, Sections 106 and 110 can neither be declared invalid nor enjoined as effecting an unconstitutional taking of property. *Hurley* v. *Kincaid,* 285 U.S. 95 (1932).

B. Since the Tucker Act provides the compensation required, if the statute is eventually found to have effected a taking of private property, the injunction at bar should be set aside without any further inquiry into the taking question. However, if the issue of a taking is examined, it becomes apparent that Section 106 of RITA does not affect a taking of private property. Congress, as an exercise of its powers under the Commerce Clause (Act I, § 8, cl.3) has a clear right to allocate the economic burdens of life between a railroad and its employees. *United States* v. *Lowden,* 308 U.S. 225 (1939). Such an allocation, moreover, is not a taking in this case because by investing in a railroad, the creditors and investors have assumed the risk that Congress would insist that the object of their investment—the Rock Island estate—honor its obligations to assist its unemployed work force. *Accord, Reconstruction Finance Corp.* v. *Denver & R.G.W.R.,* 328 U.S. 495 (1946).

ARGUMENTS

I. The Issue Of The Validity Of The Preliminary Injunction Enjoining The Implementation Of An Act Of Congress On Constitutional Grounds Is Properly Before This Court Since That Preliminary Injunction Presents A Concrete Controversy Involving The Application Of The Fifth Amendment To Sections 106 and 110 Of RITA, As Modified By The SRA.

In its order of April 27, 1981, noting probable jurisdiction in No. 80-1239, this Court asked the parties to address the issue of whether the constitutionality of Sections 106 and 110 of RITA, as modified by the SRA, 45 U.S.C. §§ 1005, 1008, is properly before this Court. Appellant RLEA respectfully submits that the issue of whether Sections 106 and 110 of RITA, as modified, effect an *uncompensated* taking of private property for public purposes is properly before this Court since the CRI reorganization court, and then the court of appeals by affirming the interlocutory injunction, relied upon the Taking Clause of the Fifth Amendment to the United States Constitution[11] to enjoin the implementation of that Act of Congress. However, appellant respectfully submits that the underlying constitutional issue of whether those sections effect a *taking of property* within the meaning of the Fifth Amendment is not ripe for adjudication since that question is premature and is not presently presented in a "clean-cut and concrete form . . . ." *Rescue Army* v. *Municipal Court, 331 U.S. 549, 584 (1947).*[12]

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[11] The Taking Clause provides as follows: "[N]or shall private property be taken for public use without just compensation."

[12] Appellant RLEA respectfully submits that its appeal in No. 80-415 no longer presents a justiciable issue for that appeal has been rendered moot by the passage of the SRA amendments to Sections 106 and 110 of RITA. It is axiomatic that a reviewing court must examine the validity of an injunctive order in the light of the law as it stands when that injunction is reviewed, not as it stood when the injunction was issued. *Diffenderfer* v. *Central Baptist Church,* 404 U.S. 412, 414 (1972); *Bryan* v. *Austin,* 354 U.S. 933 (1957). Where the

When Congress enacted RITA in May 1980, it did so with the expressed intention that the employee protective features of that Act should be implemented immediately "so that payments to Rock Island employees will be made forthwith, notwithstanding any ensuing litigation concerning such payments." H. Rpt. No. 96-1041, 96th Cong., 2d Sess. at 26 (1980). That intent, however, was not honored, because, acting upon the Rock Island appellees' request for interlocutory injunctive relief, the CRI reorganization court concluded on June 9, 1980, that Sections 106 and 110, if implemented, would effect "an unconstitutional taking, an unconstitutional deprivation of the property rights of the creditors." J.A. 154a. After noting that the probability of a reaffirmation of the "unconstitutionality of this Act after more mature consideration and deliberations is exceedingly great" (J.A. 156a), the reorganization court decided that a balancing of the equities required the intrusion of the court into the "implementation of this statutory program on constitutional grounds." J.A. 154a.

Appellee United States had argued that it was premature to rule on the constitutionality of Section 106 since the ICC had

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amended law materially affects the rationale for the issuance of the injunction in the first place, it can nullify the justiciability of an appeal. *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). Moreover, where the subsequent law is itself the new source of the dispute between the parties, a decision on the prior law will not affect the rights of the parties, and thus, an appeal from an injunction under the prior law is, without more, moot. *E.g.*, *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 115-17 (1920). That is the situation presented by appellant's appeal in No. 80-415, for the SRA amendments and the issues presented in No. 80-1239 will determine whether Section 106 can be implemented as Congress has directed; the injunction in No. 80-415 is now of academic interest only. Consequently, appellant respectfully submits, this Court should note probable jurisdiction over appellant's appeal in No. 80-415, and should vacate the June 9th interlocutory order of the reorganization court. *University of Tex.* v. *Camenisch*, Sup. Ct. No. 80-317, decided April 29, 1981.

not yet established the limit of the Trustee's potential obligation under that section. J.A. 144a-45a. That argument was rejected by the reorganization court which stated:

> It [the plan eventually promulgated by the ICC] might even be much less than the $75 million, it might be $50 million or $25 million. The issues [*sic*] is not whether the I.C.C. can arrive at a labor protection plan which the creditors and the Trustee could live with, even if that plan were to cost the Estate only $1 million. The issue is whether ab initio, the concept of a compelled labor protection plan, paid for out of the Estate, whatever the plan, has any constitutional sanction. We don't have to wait for an I.C.C. determination of the details of the plan to determine that issue.

J.A. 155a. The court then addressed that issue, and stated that:

> One of the central issues in this case is and always has been and will be and will continue to be to what extent the private sector, here the creditors and the bondholders, can be saddled with the public interest. Congress may determine public interest, but Congress may not take private property to serve the public interest.

J.A. 156a. Those conclusions were reiterated by the CRI reorganization court on June 20, 1981, when it denied appellant's and the federal appellees' motions to reconsider its earlier ruling. J.A. 180a.

After appellant and the government were unsuccessful in obtaining a stay of the June 1980 preliminary injunction (*RLEA* v. *Gibbons*, 448 U.S. 909 (1980)), Congress once again passed legislation on this subject, and it once again specifically expressed its intention that "the benefits and allowances [under Section 106 of RITA, as modified, should] . . . immediately become available to the qualifying Rock Island employees and the Trustee [could] . . . pursue his allegations of unconstitutional action under the Tucker Act [28 U.S.C. §§ 1346(a), 1491]." H. Rpt. No. 96-1430, 96th Cong., 2d Sess. at 138 (1980). But once again Congress' intent was blocked by the CRI reorganization court, and then by the

court of appeals, because, as the reorganization court held in its October order:

> The Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property in violation of the rights of the Rock Island estate, its creditors and shareholders which are secured by the Fifth Amendment of the United States Constitution.

J.A. 207a. The impact of the availability of a Tucker Act remedy on that conclusion, however, was not addressed by the lower courts even though appellant had argued that Congress' specific reference to the Tucker Act satisfied the compensation portion of the Fifth Amendment's Taking Clause. 7th Cir. No. 80-2487, Brief for Appellant at 32-35.

Since the October 1980 injunctive order and its affirmance by the court of appeals involve an "interlocutory . . . order . . . holding an Act of Congress unconstitutional in [a] . . . civil . . . proceeding to which the United States or any of its agencies, or any officer . . . is a party" (28 U.S.C. § 1252), this Court clearly has the jurisdiction to consider appellant's appeal in No. 80-1239. *Accord, Parker* v. *Levy,* 417 U.S. 733 (1974). Indeed, no party to this proceeding has disputed this Court's jurisdiction over this appeal. But while that jurisdiction may technically be present, its exercise over constitutional issues may be inappropriate if problems such as "prematurity and abstractness" present insuperable obstacles to its effective exercise. *E.g., Socialist Labor Party* v. *Gilligan,* 406 U.S. 583, 588 (1972). Appellant RLEA respectfully submits that no such problems make the exercise of that jurisdiction inappropriate over the constitutional issue of compensation which is presented by No. 80-1239. *E.g., Dames & Moore* v. *Regan,* Sup. Ct. No. 80-2078, decided July 2, 1981, slip op. at 31; *Regional Rail Reorganization Act Cases* [hereinafter, *"Rail Act Cases"*], 419 U.S. 102, 145-46. (1974). However the same is not true for the underlying issue of the taking itself.

Appellant RLEA respectfully submits that this appeal places before this Court in a clean-cut and concrete form the con-

stitutional issue of whether Congress' addition of Section 124 (c) to RITA, and its modification of Section 110(e) of that Act, obviates the conclusion that Sections 106 and 110 of RITA, as thus modified by Section 701 of the SRA, could effect an *uncompensated* taking of property. Implementation of Sections 106 and 110 of RITA were enjoined, over appellant's objections, because the courts below believed that those provisions constituted a taking of private property for public use. However, if at the time of the taking there is a "reasonable, certain and adequate provision for obtaining compensation" (*Cherokee Nation* v. *Southern Kansas Ry.*, 135 U.S. 641, 659 (1890)), the taking is not in violation of the Taking Clause of the Fifth Amendment. *Rail Act Cases, supra,* 419 U.S. at 124-27. Since all of the facts material to determining whether the Tucker Act remedy satisfies the just compensation portion of the Taking Clause, are developed as fully as can be at this stage of the implementation of Sections 106 and 110 of RITA, as modified, and since the implementation of those provisions is being enjoined because of the Taking Clause, it cannot be contended that this case presents the compensation issue in a non-justiciable, abstract manner. *E.g., Dames & Moore* v. *Regan, supra,* slip op. at 30-31; *accord, Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94 n.39 (1978). An expedited trial on the merits of the Rock Island appellees' complaint (*see,* Rule 65(a)(2), Fed. R. Civ. P.), would not have shed any additional light on this question since a more developed factual record must await the actual implementation of the program—an event which will not occur until the bar of this injunction is removed. *Accord, Agins* v. *City of Tiburon,* 447 U.S. 255, 260 (1980). Moreover, it is clear that appellant's appeal is not premature, since a program which Congress has twice mandated should be implemented speedily has now been delayed for more than a year because of the controversy over the issue of compensation.

However, the conclusion that the compensation issue is properly before this Court in No. 80-1239, does not necessarily mean that the subsidiary issue whether Sections 106 and 110 of RITA constitute a taking of property, is also properly before this Court at this time. *Rail Act Cases, supra,* 419 U.S.

at 145-46. Appellant RLEA respectfully submits that the taking issue is not properly before this Court, and *a fortiori* was improperly passed upon by the courts below, for several reasons. First, if as appellant asserts the Tucker Act provides the compensation required by the Fifth Amendment, it is premature to consider whether a taking has occurred until a request for compensation is presented. No such request has been made here. Second, the underlying question of a taking as posed by the Rock Island appellees is still an abstract issue.

The Rock Island appellees assert that Section 106 of RITA is a regulation which has gone too far; but when a regulation becomes a taking is a question for which "this Court, quite simply, has been unable to develop any 'set formula' for determining . . . ." *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978). That determination ultimately involves "essentially ad hoc, factual inquiries" which include an examination of, among other factors, the degree of the intrusion of the regulation into the claimant's property interest. *Id.*; *see also, San Diego Gas & Electric Co.* v. *City of San Diego*, Sup. Ct. No. 79-678, decided March 24, 1981 (Brennan, J., dissenting), slip op. at 12-17. Such a detailed inquiry, appellant RLEA respectfully submits, involves more than a facial constitutional inquiry, and could not have validly been made in the case at bar until *after* the employee protection program has been implemented and the question of ultimate liability for that program becomes justiciable.

Section 106 of RITA, as amended, provides that if the parties are unable to reach an agreement on a protective formula, the ICC

> shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection . . . . For purposes of this subsection, the term "fair and equitable" means no less protective of the interests of employees than protection afforded under [Section 9 of the MRRA, 45 U.S.C. § 908] . . . , subject to the limitations set forth in section 110 of this title.

45 U.S.C. §§ 1005(b). Section 110(d) of RITA provided that the total liability of the Rock Island for benefits and al-

lowances under Section 106 could "not exceed $75,000,000." 45 U.S.C. § 1008(d). Moreover, Section 106(e)(2) of the Act, 45 U.S.C. § 1005(e)(2) (emphasis added), provided that the Rock Island should pay such benefits or allowances either from its own assets "*or* in accordance with" Section 110 of the Act. Section 110(a), 45 U.S.C. § 1008(a) (emphasis added), provided that the Secretary of Transportation, upon request, "*shall* guarantee obligations of the Rock Island Railroad for purposes of providing employee protection in accordance with" Section 106. *See*, 12 U.S.C. § 2285. In short, Congress has provided in Sections 106 and 110 of RITA, a compact program designed to provide needed funds to employees, and yet, at the same time, not deplete the cash reserves of the estate.

While appellant RLEA respectfully submits that the facts of this case are sufficient to show at this time that Sections 106 and 110 of RITA survive a mere facial challenge to their constitutionality since they do not affront on their face the Due Process Clause of the Fifth Amendment (*e.g., United States* v. *Lowden*, 308 U.S. 225, 240 (1939)), a contrary determination (*i.e.*, that a regulation has become a taking) must await: (a) the promulgation of the arrangement; (b) its implementation; (c) its funding, and (d) a request for just compensation or a refusal to reimburse the government.[13] It will only be after

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[13] It should also be noted that the Indenture Trustees and the shareholders do not have standing to make a facial challenge on a Taking Clause basis for the following reasons. First, the secured bondholders have not shown that their security interest is insufficient to satisfy the estate's debt towards them. Consequently, their attack on statute is, at best, premature. *See, Warth* v. *Seldin*, 422 U.S. 490, 498-99 (1975). Second, the shareholders and the general creditors do not have a property interest directly affected by the enactment of the Section 106 obligation; their interest is only secondary in that the satisfaction of that obligation makes an ultimate satisfaction of their intangible interests more remote. Such indirect interests are not property rights protected by the Taking Clause. *Louisville & N.R.* v. *Mottley*, 219 U.S. 467, 484 (1911); *accord, Duke Power Co.* v. *Carolina Env. Study Group, supra*, 438 U.S. at 88 n.32.

those events have occurred that the true costs of the program in relation to the entire estate's worth will be known. And it will only be at that time that the issue of a taking can be adjudicated in either a suit by the Trustee under the Tucker Act, 28 U.S.C. § 1491, to recover funds expended, or on a contention by the Government in the reorganization proceeding itself that its claim under Section 110 of RITA has been improperly subordinated to that of the shareholders. Until the program is implemented, the Rock Island appellees' claims of a taking are premature, and thus, non-justiciable. *E.g., Hodel* v. *Virginia Surface Mining & Reclamation Assoc., Inc.*, Sup. Ct. No. 79-1538, decided June 15, 1981, slip op. at 26-31.

This conclusion is supported by this Court's decision in *Coffman* v. *Breeze Corporations, Inc.*, 323 U.S. 316 (1945), in which the Court concluded that a complainant did not present a justiciable issue when he sought to enjoin enforcement of, and to have declared unconstitutional, an Act of Congress. *Coffman* involved a suit by a patent owner against his licensees to enjoin their paying accrued royalties to the Government under the Royalty Adjustment Act of 1942,[14] and to have that Act declared unconstitutional. The lower courts had concluded that the suit should be dismissed for lack of equity jurisdiction and for want of a justiciable case or controversy; this Court affirmed. As the Court stated in explaining its ruling:

> So far as the present suit seeks a declaratory judgment or an injunction restraining payment of the royalties into the Treasury, it raises no justiciable issue. Appellant asserts in the present suit no right to recover the royalties. It asks only a determination that the Royalty Adjustment Act is unconstitutional and, if so found, that compliance with the Act be enjoined . . . . If contested, the validity of the Act would be an issue which, so far as it could ever become material, would properly arise only in a suit to

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[14] 56 Stat. 1013 (1942). That Act applied to government contracts and provided that the licensor must sue the United States to recover any reduced royalty payments which are claimed to be owed.

recover the royalties where it could be appropriately decided.

323 U.S. at 323-24. That case, appellant RLEA respectfully submits, is analogous to the case at bar.

As in *Coffman*, the Rock Island appellees are seeking to prevent an Act of Congress from being implemented. They are not, in reality, seeking to prevent any monies from being taken initially from the estate, but rather, are objecting to the estate's being required to borrow funds to comply with the statute, for it may subsequently be decided that such borrowings were unlawful. But, as in *Coffman*, that issue is more properly raised when either the government seeks to enforce its loan guarantee under Section 110 if RITA, or the shareholders, or the creditors if the assets otherwise available prove inadequate, bring an action against the Government under the Tucker Act to recover. Until the issue is joined in such a manner, a justiciable case or controversy has not been presented, and just as this Court should not address the constitutional issue of a taking at this time, an injunction to restrain enforcement of the Act, on that ground, was improper. *Coffman* v. *Breeze Corporation, Inc., supra.*

II. The Courts Below Improperly Enjoined On Fifth Amendment Grounds An Act of Congress, Which Congress Has Twice Declared To Be Essential To Rail Transportation, Since By Providing A Tucker Act Remedy To The Rock Island Estate, Congress Has Precluded A Finding That The Act Could Effect An Uncompensated Taking Of Property

Convinced that Congress had no right to require the Rock Island estate to aid its unemployed work force, the CRI reorganization court ruled that the statutory scheme twice devised by Congress should not be permitted to be implemented because, in the court's opinion, that program (notwithstanding the availability of a Tucker Act remedy), effected an unconstitutional taking of private property for public purposes. To prevent its implementation, the reorganization court exercised its equity powers and

preliminarily enjoined the enforcement of that Act even though Congress had twice declared that it intended its employee protective program to be implemented forthwith, notwithstanding any litigation over its validity, and that it considered its legislative program to be essential to the continuation of rail service to a substantial region of our country. Appellant RLEA respectfully submits that the reorganization court, and then the court of appeals by affirming that injunction, have abused their discretion, for they have completely frustrated the intent of Congress based upon a claim of an unconstitutional taking of property despite Congress' provision of compensation as required by the Fifth Amendment.

It is well settled that a request for an interlocutory injunction, such as that made by the Rock Island appellees in the cases at bar, is addressed to the discretionary and equitable powers of a court. *E.g., Virginia Petroleum Jobbers Assoc.* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958). Those discretionary powers, however, are neither "unfettered by meaningful standards [nor] . . . shielded from thorough appellate review." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975). Rather, the courts have developed over the years a precise standard which requires a balancing of the equities involved with the probability for success on the merits. *E.g., American Medical Assoc.* v. *Weinberger*, 522 F.2d 921 (7th Cir. 1975). Moreover, when the moving party is attempting to enjoin an Act of Congress, the separation of powers doctrine (*see, Goldwater* v. *Carter*, 444 U.S. 996 (1979)) mandates that the Act be examined with a "presumption of constitutionality" and that the "burden" of upsetting that presumption be placed upon the party attacking its constitutionality. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). When those principles are applied to the injunction in No. 80-1239, it becomes apparent that the courts below have improperly enjoined the implementation of Sections 106 and 110 of RITA, as amended by the SRA.

A. By expressly providing that nothing in RITA shall limit the right of any person to commence an action under the Tucker Act, Congress precluded the finding that Sections 106 and 110 of RITA could effect an uncompensated taking of property

When the CRI reorganization court's rulings are examined to ascertain the precise basis for its decision to enjoin the implementation of Sections 106 and 110 of RITA, even as amended, it becomes apparent that the lower court enjoined the employee protective features of RITA because it did not accept the argument that Congress can, consistently with the Fifth Amendment, take property and provide the compensation required by that amendment through a subsequent Tucker Act suit. As the court explained:

> The argument that the Tucker Act is available and therefore we could go ahead with the unconstitutional taking because the Tucker Act will allow everything to turn out in the end really does not impress me. I share [counsel's] . . . comment, or argument, that you do not proceed, nor must the court allow proceedings under what is patently unconstitutional legislation because there is a remedy somewhere down the line that may straighten things out.

J.A. 202a-03a. In other words, the reorganization court enjoined implementation of Sections 106 and 110 of RITA, as amended, because it concluded that the Fifth Amendment requires the government to compensate an owner of property before it takes private property. Appellant RLEA respectfully submits that such a conclusion was error, for it is well settled that the Fifth Amendment "does not entitle [a property owner] to be paid in advance of the taking." *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932).

Cited as one of the fundamental principles of common law (3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1784 (1833)), the Fifth Amendment Taking Clause's protections are "designed to bar Government from forcing some people alone to bear public burdens which, in all fair-

ness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). To achieve the purpose of the Taking Clause, however, the government need not actually pay just compensation *before* a taking can occur; it is sufficient that at the time of taking the government has provided to the property owner a "reasonable, certain and adequate [means] to secure the just compensation . . . ." *Cherokee Nation* v. *Southern Kansas Ry., supra*, 135 U.S. at 659; *accord, Sweet* v. *Rechel*, 159 U.S. 380, 400-01 (1895). The Tucker Act remedy, 28 U.S.C. §§1346(a), 1491, has been held by this Court on many occasions to provide the just compensation required by the Taking Clause. *E.g., Dames & Moore* v. *Regan, supra*, slip op. at 30-31; *Rail Act Cases, supra*, 419 U.S. at 125-27; *accord, Duke Power Co.* v. *Carolina Environmental Study Group Inc., supra*, 438 U.S. at 94 n.39.

Prior to the passage of the Tucker Act in 1887, 24 Stat. 505, claims against the government could only be redressed by a petition to Congress because of sovereign immunity. Remarks of Rep. Springer, 18 Cong. Rec. 2680 (March 3, 1887). To avoid spending unnecessary time on matters which were more appropriately considered by a court of justice, and in order to follow the trend of that time of permitting suits against governments (*see*, H. Rpt. No. 1077, 49th Cong., 1st Sess. at 1, 3 (1886)), Congress enacted a bill to authorize "Suits Against the Government," which has since become known as the Tucker Act. By a provision in that Act, Congress expanded the jurisdiction of the Court of Claims by "engrafting" upon its prior jurisdiction the power to hear "'[c]laims founded upon the Constitution of the United States,' such as for just compensation for property taken for public use, &c." H. Rpt. No. 1077, *supra*, at 4. That jurisdiction still exists today, and as Congress provided in its SRA amendments to RITA, nothing in RITA should be read as withdrawing that remedy. 45 U.S.C. §1018(c), as amended.

When Congress, in the exercise of its powers under the Commerce Clause of the Constitution (Act. 1, §8, cl. 3), imposes a regulation designed to promote interstate com-

merce, that regulation, by definition, involves the adjustment of rights for the public good. *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979). Since government need not regulate by "purchase" (*Id.*), Congress has the power to adjust the burdens and benefits of economic life (*e.g.*, *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, 428 U.S. at 15-16), "subject only to the dictates" of justice and fairness. *Andrus* v. *Allard*, *supra*, 444 U.S. at 65. When Congress exceeds the bounds of permissible regulation, and by regulation effects a taking of property, the Taking Clause guarantees takeover and provide a cause of action to the affected property owner to obtain "just compensation" either on a claim founded upon the Constitution within the meaning of the Tucker Act's grant of jurisdiction to the Court of Claims, or based upon an implied promise to pay compensation, also within the jurisdiction of the Court of Claims. *Rail Act Cases*, *supra*, 419 U.S. at 126-27 (and cases cited therein). Since the Tucker Act provides the means to obtain compensation, the assailed action is neither unconstitutional nor enjoinable as causing an uncompensated taking. *E.g.*, *Dames & Moore* v. *Regan*, *supra*, *Hurley* v. *Kincaid*, *supra*.

In *Hurley* v. *Kincaid*, *supra*, this Court addressed the question of whether an injunction could issue to enjoin a taking by the government without prior compensation in asserted violation of the Fifth Amendment. The Court answered the question in the negative stating:

> For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's lands, the illegality . . . is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law. The 5th Amendment does not entitle him to be paid in advance of the taking.

285 U.S. at 104 (footnote omitted). The injunction in that case was set aside because the Court concluded that "the complainant has a plain, adequate and complete remedy at law"—*i.e.*, the Tucker Act. *Id.* at 105. That holding, appellant RLEA submits, is applicable and is controlling in the case *sub judice*

for like Kincaid, the estate has a remedy at law—the Tucker Act—to recover if a taking is subsequently found to have occurred.

When *Hurley* is applied to the injunction *sub judice*, it becomes apparent that the courts below improperly enjoined the implementation of Sections 106 and 110 of RITA, as amended. If, as the courts below concluded, Section 106 is a regulation which has become a taking, then Congress has impliedly promised to pay just compensation to the estate. 45 U.S.C. §1018(c). That implied promise makes the taking constitutional. Sections 106 and 110, therefore, are not enjoinable as effecting an uncompensated taking.

The Rock Island appellees' and the lower courts' concern with such a view of the compensation aspects of the Taking Clause is that it affronts their notions of fairness to permit the government to take private property and then say "sue me" to obtain the compensation due. J.A. 201a. Even in a situation where there is no justification for the government's refusal to accept a complainant's assertion that the assailed action is a taking, such a haughty attitude on the government's part does not make the assailed taking unconstitutional because the provision for compensation in the Tucker Act satisfies the guarantees of the Taking Clause. *E.g.*, *Stringer* v. *United States*, 471 F.2d 381, 383-84 (5th Cir. 1973). However, in the case at bar it cannot be contended that the government's action is "high-handed," for Congress reasonably and, appellant RLEA submits, correctly believed that the Rock Island estate has an obligation to protect its unemployed workers. Congress has insisted in RITA that the estate honor that obligation; but Congress has also provided in that Act an implied promise to pay just compensation if its view of the Rock Island's obligations is not sustained by the judiciary. Surely such an attitude is neither unreasonable nor high-handed; but more importantly, it is not in excess of Congress' powers nor in contravention of the guarantees of the Taking Clause.

B. Section 106 of RITA is not a regulation which, on its face, has become a taking of private property, for by investing in a railroad the Rock Island creditors and shareholders have assumed the risk that their interests will be subordinated to the interests of the public in protecting unemployed Rock Island employees

As shown by Argument I, *supra*, the validity of the taking was not properly before the lower courts, and is not before this Court, because it is premature and abstract at this time. Moreover, the availability of the Tucker Act remedy, as shown by Argument II (B), *supra*, makes a consideration of this issue inappropriate at this time. *See, Duke Power Co.* v. *Carolina Environmental Study Group Inc., supra*, 438 U.S. at 94 n.39. However, if this Court concludes that the taking issue is properly reviewable, appellant RLEA respectfully submits that the record in the cases at bar shows that the courts below improperly concluded that the Rock Island appellees stand a substantial chance of succeeding on the merits of their attack on the constitutionality of Sections 106 and 110 of RITA, as amended. Moreover, when the merits of the CRI appellees' arguments are balanced against the equities in this case, particularly with the public interest factors, it becomes apparent that the lower courts abused their discretion in enjoining the employee protection program of RITA.

Through its consideration of the injunctions *sub judice*, the CRI reorganization court asserted that its earlier conclusion that the Rock Island was no longer reorganizable (*see*, Sup. Ct. No. 80-1899) meant that, as a non-operating railroad, the Rock Island was no longer suffused with the public interest; the Rock Island had become simply "a private business with a lot of creditors which own some property and which is being liquidated for the benefit of creditors . . . ." J.A. 180a. Since the Rock Island estate was now private property, Congress, according to the reorganization court, could no longer look to the estate to "fund a legislatively created special benefits program" for unemployed Rock Island employees. J.A. 180a; *see also*, 153a, 155a. That view of the Act's validity was not

dependent upon the degree of the intrusion into the estate's assets (J.A. 155a), but rather, was premised upon the simple assertion that "Congress may not take private property to serve the public interest" (J.A. 156a), regardless of the amount appropriated or the reason for its expropriation. Appellant RLEA respectfully submits that the CRI reorganization improperly viewed the nature of the Rock Island estate and its relation to the public interest, and that once that relationship is viewed in its proper perspective, the injunction at bar becomes improvidently issued.

Congress' powers under the Commerce Clause of the Constitution are extensive and, indeed, have been stated to be plenary. *E.g., NRLB* v. *Fainblatt*, 306 U.S. 601,606 (1939); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). When Congress exercises that power and prescribes regulations which adjust "the burdens and benefits of economic life," such legislative acts carry with them a "presumption of constitutionality," especially where Congress, as in the cases at bar, allocates "the interlocking economic rights and duties of employers and employees upon workmen's compensation principles . . . ." *Usery* v. *Turner Elkhorn Mining Co., supra*, 428 U.S. at 15. Moreover:

> A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends

Hodel v. *Indiana*, Sup. Ct. No. 80-231, decided June 15, 1981, slip op. at 7. Section 106 of RITA clearly has a rational basis and connection, for this Court has so held in other cases involving comparable employee protective provisions. *E.g., United States* v. *Lowden, supra*, 308 U.S. at 240; *ICC* v. *Railway Labor Executors' Assoc.*, 315 U.S. 373 (1942).

It has long been recognized that the railroad employee is an important, and indeed essential component of our national rail transportation system. Since the passage of the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, Congress

has attempted to shield railroad employees from bearing the full burden of the economies which railroads could achieve in modifying their rail systems by requiring railroads to share the burden of the adverse consequences.[15] *E.g.*, Emergency Railroad Transportation Act of 1933, § 7, 48 Stat. 218; 49 U.S.C. §10903(b)(2); SRA § 227, 94 Stat. 1931 (*amending* 11 U.S.C. §1170, 1172(b)). It is now well settled that what the ICC said in *St. Paul Bridge & Terminal Ry.—Control*, 199 I.C.C. 588, 595 (1934), is equally true today, and supplies both the rational basis and the rational connection to shelter Section 106 from a due process attack:

> There is no definition here [in the predecessor provision to §11344] of the public interest. The language is broad enough to comprehend every public interest and the interest of every group or element of the public. . . . Since employees of railway companies are important elements of the railway transportation industry and of the communities in which railways operate, their interest in changes in management, ownership, or operation of the companies by which they are employed is manifest.

As this Court explained in *United States* v. *Lowden*, *supra*, 308 U.S. at 235-36:

> The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

Even when protective conditions are imposed upon an action taken to aid a carrier in reorganization survive, the requirement that a railroad provide economic protections to its em-

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[15] Congress has evidenced a concern for railroad employees for almost a century, beginning with the Arbitration Act of 1888 (*see*, C.M.R. Rehmus, *Railway Labor Act at Fifty*, pp. 1-22 (GPO 1977)), and including virtually every major act affecting railroads since 1920.

ployees, does not affront the Due Process Clause of the Fifth Amendment since "a business may be required to carry the burden of employee wastage incident to its operation . . . ." *United States* v. *Lowden, supra,* 308 U.S. at 240 (involving economic action of Rock Island predecessor while in reorganization).

Considerations involving employee interests, consequently, have been an integral part of the railroad industry for more than a half century, and any investor who has invested in that industry has done so with the clear understanding that his investment was subject to those interests. *Cf., Reconstruction Finance Corp.* v. *Denver & R.G.W.R.,* 328 U.S. 495 (1946). Conversely, workers have entered and have remained in the railroad industry with the clear understanding that loyal service to that industry will not be ignored (*e.g., United States* v. *Lowden, supra,* 308 U.S. at 234-36), and that, in exchange for that dedication, they will enjoy a form of guaranteed job security. *E.g.,* 49 U.S.C. §§10903(b)(2), 11347.

In this case, thousands of Rock Island employees relied upon those assurances and continued to work for that carrier, even though it was in reorganization, and even though to all but the naive its future prospects were grim. Congress was well aware of that dedication when, in enacting the MRRA and extending to the CRI court the power to authorize abandonments, it limited that power by providing that: "In authorizing any abandonment pursuant to [Section 17(a)] . . . , the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49." 45 U.S.C. § 915(a). It was to assure that its intent in qualifying Section 17(a) of the MRRA was honored, and that some form of immediate protective benefits were made available to needy Rock Island employees, that Congress enacted Section 106 of RITA. Surely, the Rock Island appellees have not shown that Congress lacked a rational basis for concluding in Sections 102(1) and (2) of RITA, 45 U.S.C. §1001(1), (2), that its provision of aid for unemployed Rock Island employees was reasonably

related to rail transportation in the Rock Island region. Nor can it be asserted that Congress erred in concluding that the means it chose to accomplish its objectives was reasonably related to the ends it sought to obtain.

Apparently recognizing that Section 106 is a permissible regulation for a railroad, the Rock Island appellees and the reorganization court argue that the statute in question is now an impermissible regulation because the Rock Island is being liquidated. J.A. 180a. That argument, however, ignores the fact that the Rock Island estate will continue to be important to the public interest for so long as it owns or possesses tracks which are essential to or needed for rail service. Indeed, it was to provide for an orderly transition from Rock Island operations to service by other carriers that Congress enacted RITA. 45 U.S.C. §1001. And to achieve that end, Congress concluded that unemployed Rock Island employees must receive economic protections to assure a steady and sure supply of labor for all railroads. *See*, H.R. 7235, § 227(c), 126 Cong.Rec. H8619 (September 9, 1980); H. Rpt. No. 96-1430, *supra*, at 138-39. Surely, Congress' conclusion cannot be said to be unreasonable. *E.g., Usery* v. *Turner Elkhorn Mining Co., supra.*

Nevertheless, the CRI reorganization court concluded that Section 106 of RITA effected a taking because, in the court's opinion, "justice and fairness" required that the public, and not the Rock Island creditors, pay for the public good which Congress hoped to achieve from enacting that section. J.A. 180a-81a. However, when that assertion is examined critically, it fails because the Rock Island creditors and shareholders have no "property right" which is being "taken" by Section 106. In light of certain decisions by the ICC,[16] those parties may have had a faint hope that the estate might possibly es-

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[16] *E.G., Wellsville, A.& G.R.—Abandonment*, 354 I.C.C. 744 (1978); *but see, In re Penn Central Transp. Co.*, 347 I.C.C. 45, 92 (1973); H. Rpt. 96-839, *supra*, at 63-66 (letter from ICC General Counsel).

cape its obligations under 49 U.S.C. §10903(b)(2) or 45 U.S.C. § 915(a) to aid employees, but that expectation was not "sufficiently bound up with the reasonable expectations [of a property owner] . . . to constitute 'property' for Fifth Amendment Purposes." *Penn Central Transportation Co.* v. *New York City, supra,* 438 U.S. at 125.

Railroads are *sui generis* in that they are a private enterprise suffused with the public interest. That public interest enabled the railroads, including the Rock Island's predecessors, to obtain much of the land on which their tracks lie today. *E.g.*, Speech of Rep. John A. Anderson, 18 Cong. Rec. (Appendix) 137-38 (February 28, 1887); Kansas Statutes Ann. § 66-501; *see generally,* F. Wilner, *Competitive Equity* at 28-31 (Assoc. of American R.R., 1981). Indeed, the railroads were able to obtain their right of ways because Congress and the various States considered railroads essential to the public interest. *See,* Act of July 1, 1862, 37th Cong., 2d Sess., ch. 120, §18, 12 Stat. 497. Congress and the States nurtured the railroads and provided the necessary regulations, legislative assistance and financial support to aid their economic survival; the Rock Island and its predecessors received part of that aid. *E.g., Chicago, R.I. & P. Ry.—Reconstruction Loan,* 184 I.C.C. 597 (1932); *Loan to Chicago, R.I. & P. Ry.* 65 I.C.C. 224, 371 (1920). Consequently, every mile of track and each piece of equipment possessed by the CRI estate is impregnated with the public interest.

While investors in a railroad "cannot be called upon to sacrifice their property so that a depression-proof railroad system might be created" *(Reconstruction Finance Corp.* v. *Denver & R.G.W. R., supra,* 328 U.S. at 535; *see also, Brooks-Scanlon Co.* v. *Railroad Comm.*, 251 U.S. 396 (1920)), it is also true that the protection of railroad creditors' and shareholders' property interests "do not command Procrustean measures." *Penn-Central Merger Cases,* 389 U.S. 486, 511 (1968). By investing in a railroad that owes an obligation to the public, the creditors and shareholders in this case have "assumed the risk that in any depression or any reorganization

the interests of the public would be considered as well as theirs." *Reconstruction Finance corp.* v. *Denver & R.G.W. R., supra,* 328 U.S. at 536; *New Haven Inclusion Cases,* 399 U.S. 392, 491-92 (1970).

In this case, before the CRI reorganization court ordered the liquidation of the debtor, Congress had legislated that the interests of employees must be considered and must be protected whenever the court authorized any abandonment of lines or discontinuance of service. MRRA, § 17(a), 45 U.S.C. § 915(a). That obligation existed before RITA was enacted, and while Section 106 of RITA attempted to assure that the Rock Island estate honored its obligation to protect CRI employees, Congress also conferred a benefit upon the estate "by reducing the potential for extremely expensive labor protection claims." H. Rpt. No. 96-839, *supra,* at 22. Since the obligation to protect employees existed as an integral part of the investment in a regulated industry, the creditors and shareholders cannot now assert that Section 106 is, on its face, a regulation which has become a taking.

What was ignored by the CRI reorganization court in its rush to protect the Rock Island creditors and investors, is the fact that whatever jurisdiction it has over the Rock Island estate, including the complaint in the cases at bar, comes from Section 77 of the Bankruptcy Act. That Act requires the reorganization court to perform a balancing feat each time it passes on a question; it must conserve the debtor's assets for the benefit of creditors and at the same time serve the public interest in continued rail transportation. *E.g., New Haven Inclusion Cases, supra,* 399 U.S. at 431; *see also,* 11 U.S.C. §1165, made applicable here by Section 403(b), Pub. L. No. 95-598, 92 Stat. 2683 (1978). Consequently, when the lower courts addressed the request by the Rock Island appellees to enjoin the implementation of an Act which Congress has twice declared to be essential to that public interest, the courts should have, on the facts of these cases, deferred to the will of Congress, for as this Court has observed before:

> When the public interest, as distinguished from private, bulks large in the problem, the solution is largely a func-

> tion of the legislative and administrative agencies of government with their facilities and experience in investigating all aspects of the problem and apprising the general interest.

Ecker v. *Western Pac. R.*, 318 U.S. 448, 468 (1943) (footnote omitted). When that principle is applied to this case, it becomes apparent that not only is the public interest not served by the injunction at bar, but rather, the public interest requires that the injunction be set aside so that the employee protection program of RITA can be implemented as quickly as possible.

CONCLUSION

For the reasons set forth above, appellant RLEA respectfully submits that this Court should vacate the preliminary injunction in No. 80-1239, and should remand this case with instructions to dismiss the complaint for injunctive relief. Also, appellant respectfully submits that its appeal in No. 80-415 is now moot, and suggests that this Court note probable jurisdiction and vacate the interlocutory order therein.

Respectfully Submitted,

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Date: July 22, 1981

APPENDIX

APPENDIX A

Constitutional Provisions And Statutes Relied Upon

1. *Fifth Amendment To The Constitution Of The United States*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. *Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, as originally enacted, and as amended by Pub. L. No. 96-448**

A. Sec. 106, 45 U.S.C. §1005	Sec. 106, as amended, 45 U.S.C. §1005
Employee Protection Agreements	Employee Protection Agreements
(a) No later than [10] days after the date of enactment of [this] Act, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the	(a) No later than *5* days after the date of enactment of the *Staggers Rail* Act *of 1980*, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organiza-

* Those portions of the original Act deleted when amended by Pub.L. No. 96-448 are marked by brackets; those portions of the amended Act added by Pub.L. No. 96-448 are marked by italics.

As originally enacted	As amended
employees of such railroad, with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.	tions representing the employees of such railroad with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.
(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within [10] days after the date of enactment of [this] Act, the [parties shall immediately submit the matter] to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection no later than [30] days after the date of enactment	(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within *5* days after the date of enactment of *the Staggers Rail* Act *of 1980*, the *matter shall be immediately submitted* to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection no later than *15* days after the date of

As originally enacted	As amended
of [this] Act, unless the Rock Island Railroad and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term "fair and equitable" means no less protective of the interests of employees than protection [afforded under] section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.	enactment of *the Staggers Rail* Act *of 1980*, unless the Rock Island Railroad, and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term "fair and equitable" means no less protective of the interests of employees than protection *established by and pursuant to* section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.
(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy court shall immediately authorize and direct the Rock Island Railroad trustee to, and the Rock Island Railroad trustee and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.	(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy court shall immediately authorize and direct the Rock Island Railroad trustee to, and the Rock Island Railroad trustee and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.
(d)[(1)] An order of the Commission under subsection	(d) An order of the Commission under subsection

As originally enacted	As amended
(b) of this section [may not be stayed by the Commission or by any court, and an order of the bankruptcy court under subsection (c) of this section may not be stayed by any other court.]	(b) of this section *and any order of the bankruptcy court under subsection (c) of this section may be appealed only to the United States Court of Appeals for the Seventh Circuit.* Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed.
[(2) Any order described in paragraph (1) of this subsection may be appealed only to the court of appeals of the United States having jurisdiction to review decisions and orders of the bankruptcy court.] Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed. [No determination by the court of appeals under this subsection may be reviewed in any other court.]	
(e) (1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall	(e)(1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall

As originally enacted	As amended
be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.	be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.
(2) Benefits and allowances under such agreement or arrangement entered into under this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.	(2) Benefits and allowances under such agreement or arrangement entered into this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.
(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231f(b)(7)) is amended by striking out "and the Milwaukee Railroad Restructuring Act" and inserting in lieu thereof ", the Milwaukee Railroad Restructuring Act, and the Rock Island Railroad Transition and Employee Assistance Act".	(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231f(b)(7)) is amended by striking out "and the Milwaukee Railroad Restructuring Act" and inserting in lieu thereof ", the Milwaukee Railroad Restructuring Act, and the Rock Island Railroad Transition and Employee Assistance Act."

As originally enacted	As amended
B. Sec. 110, 45 U.S.C. §1008	Sec. 110, as amended, 45 U.S.C. §1008
Obligation Guarantees	Obligation Guarantees
(a) The Secretary, under the authority of section 511 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831), shall guarantee obligations of the Rock Island Railroad for purposes of providing employee protection in accordance with the terms of any employee protection agreement or arrangement entered into under section 106 of this title.	(a) The Secretary, under the authority of section 511 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831), shall guarantee obligations of the Rock Island Railroad for purposes of providing employee protection in accordance with the terms of any employee protection agreement or arrangement entered into under section 106 of this title.
(b) Any obligation guaranteed pursuant to this section shall be treated as an administrative expense of the estate of the Rock Island Railroad.	(b) Any obligation guaranteed pursuant to this section shall be treated as an administrative expense of the estate of the Rock Island Railroad.
(c) The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary pursuant to this section shall not exceed $75,000,000.	(c) The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary pursuant to this section shall not exceed $75,000,000.
(d) The total liability of the Rock Island Railroad in connection with benefits and	(d) The total liability of the Rock Island Railroad in connection with benefits and

As originally enacted	As amended
allowances provided under any employee protection agreement or arrangement entered into under section 106 of this title shall not exceed $75,000,000.	allowances provided under any employee protection agreement or arrangement entered into under section 106 of this title shall not exceed $75,000,000.
(e) Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under section 106 of this title.	(e) Except in connection with obligations guaranteed under this section, the United States shall incur no liability *to employees* in connection with any employee protection agreement or arrangement entered into under section 106 of this title.
(f) Section 511(g) and section 516 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831(g) and 836) shall not apply to any obligation guaranteed under this section.	(f) Section 511(g) and section 516 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831(g) and 836) shall not apply to any obligation guaranteed under this section.

C. Section 124 (c), as added by Pub.L. No. 96-448, 45 U.S.C. §1018 [no comparable provision in RITA, as originally enacted].

Sec. 124. (c) Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.) shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act).

APPENDIX B

List of RLEA Member Organizations

American Railway & Airway Supervisors Association, Division of BRAC
American Train Dispatchers Association
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railway, Airline and Steamship Clerks
Brotherhood Railway Carmen of the United States and Canada
Hotel & Restaurant Employees & Bartenders International Union
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers and Blacksmiths
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
International Longshoremen's Association
International Organization of Masters, Mates and Pilots
National Marine Engineers Beneficial Association
Railroad Yardmasters of America
Railway Employes Department, AFL-CIO
Sheet Metal Workers' International Association
Seafarers International Union of North America
Transport Workers Union of America
United Transportation Union